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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RICARDO GONZALEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether evidence is admissible under the good faith exception to the exclusionary rule when the evidence was obtained during a search that was conducted in objectively reasonable reliance on precedent holding such searches lawful under the Fourth Amendment, but, after the search, that precedent was overturned by this Court.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-5a) is reported at 578 F.3d 1130. The order of the court of appeals denying rehearing en banc (App., *infra*, 23a) and opinions concurring in and dissenting from the denial of rehearing (App., *infra*, 24a-33a, 33a-52a) are reported at 598 F.3d 1095. A prior opinion of the court of appeals (App., *infra*, 7a-9a) is not published in the Federal Reporter but is reprinted at 290 Fed. Appx. 51. The order of the district court (App., *infra*, 10a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2009. A petition for rehearing was denied on March 16, 2010 (App., *infra*, 23a-52a). On June 7, 2010, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including July 14, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Washington, respondent was convicted of possessing a firearm after being convicted of a felony, in violation of 18 U.S.C. 922(g)(1). The district court sentenced him to 70 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. App., *infra*, 7a-9a. This Court subsequently granted respondent's petition for a writ of certiorari, vacated the judgment, and remanded for further consideration in light of *Arizona* v. *Gant*, 129 S. Ct. 1710 (2009). App., *infra*, 6a. On remand, the court of appeals reversed respondent's conviction and remanded for further proceedings. *Id.* at 1a-5a.

1. In the early morning of June 19, 2006, Officer Andy Garcia of the Yakima Police Department was on routine patrol in Yakima, Washington. C.A. E.R. 8, 10, 26. At approximately 2:18 a.m., Officer Garcia observed a red Pontiac being driven without its rear license plate illuminated. App., *infra*, 11a. The officer conducted a traffic stop based on that traffic infraction. *Ibid.*

Officer Garcia discussed the infraction with the driver, who stated that she did not own the car and was not aware that the license plate was not illuminated. C.A. E.R. 14-15. The officer also asked the vehicle's three other occupants for their names and for identification. App., *infra*, 11a; C.A. E.R. 11, 16-17. The passengers identified themselves, and Officer Garcia returned to his patrol car to check their names against federal and state warrant databases. App., *infra*, 11a-12a.

Officer Garcia learned from his patrol-car computer that a rear-seat passenger in the vehicle, Silviano Rivera, was the subject of multiple outstanding arrest warrants. App., *infra*, 12a. The officer provided that information to a backup officer (Officer Michael Henne) who had arrived on the scene, and the officers arrested Rivera based on the warrants. *Ibid.*; C.A. E.R. 12, 19, 24.

Officer Garcia then had the three other occupants, including respondent, get out of and move away from the car so that the officers could search it safely incident to Rivera's arrest. App., *infra*, 12a; C.A. E.R. 78-79. After they complied, Officer Garcia conducted a search of the passenger compartment and discovered a loaded 9mm Beretta handgun in the vehicle's unlocked glove compartment. App., *infra*, 12a; see C.A. E.R. 12-13, 35, 37. At that point, the officers secured the vehicle's three recent occupants in handcuffs and separated them for

questioning. *Id.* at 80. Officer Garcia also called a police dispatcher and requested a camera to photograph the handgun. *Id.* at 26, 39. Around 2:39 a.m., Officer Jared Nesary arrived on the scene, and he subsequently photographed and secured the handgun. *Id.* at 24, 26, 37, 44.

Officer Garcia questioned the vehicle's driver and the other female passenger, both of whom told him that the gun belonged to respondent. C.A. E.R. 30-31, 37-38. After the officer determined that respondent was a convicted felon, he arrested respondent for being a felon in possession of a firearm. *Id.* at 38.[1]

2. A federal grand jury indicted respondent on one count of possessing a firearm after being convicted of a felony, in violation of 18 U.S.C. 922(g)(1). C.A. E.R. 1-2. Respondent moved to suppress the firearm. The district court held an evidentiary hearing and denied the motion. App., *infra*, 10a-15a. The court concluded that "Officer Garcia had authority under *New York* v. *Belton*, 453 U.S. 454, 460 (1981), to search the vehicle incident to Mr. Rivera's arrest." *Id.* at 14a. Respondent was convicted, and he appealed.

In August 2008, a panel of the Ninth Circuit affirmed. App., *infra*, 7a-9a. As relevant here, the court concluded that the vehicle search was lawful, explaining that "[respondent] concedes that Officer Garcia's search of the passenger compartment of the vehicle, including the unlocked glove box, was a lawful search incident to the arrest of passenger Rivera under *New York* v. *Belton*." App., *infra*, 8a. In reaching that judgment, the

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[1] The traffic stop, arrests, and the search lasted approximately 40 minutes. Officer Nesary transported Rivera away from the scene in his patrol car around 2:56 a.m. C.A. E.R. 26-27, 29, 38; see *id.* at 13. Approximately two minutes later, Officer Garcia separately departed with respondent in his patrol car. *Id.* at 27, 29, 38.

panel cited (*ibid.*) the Ninth Circuit's prior decision in *United States* v. *Weaver*, 433 F.3d 1104 (2006), which affirmed a *Belton* search of a vehicle incident to an arrest and relies heavily on the Ninth Circuit's earlier decision in *United States* v. *McLaughlin*, 170 F.3d 889 (1999). See *Weaver*, 433 F.3d at 1106-1107 & n.1.

3. The panel's decision reflected the then-prevailing understanding of *Belton* among the lower courts. Before the Court's April 2009 decision in *Arizona* v. *Gant*, *Belton* was "widely understood" by lower courts across the nation to permit searches in which a recent occupant of a vehicle was arrested, handcuffed, and placed in a police car before the vehicle was searched. See *Gant*, 129 S. Ct. at 1718. The cases following that "widely accepted" understanding of *Belton* were "legion." *Id.* at 1718, 1722 n.11 (quoting *Thornton* v. *United States*, 541 U.S. 615, 628 (2004) (Scalia, J., concurring in the judgment)).

The Ninth Circuit's decision in *McLaughlin* was among that "legion" of decisions. *Thornton*, 541 U.S. at 628 (Scalia, J., concurring) (citing *McLaughlin* and other cases). *McLaughlin* held that *Belton* established a "bright-line rule" authorizing officers to search a vehicle incident to an arrest, even when the arrestee was unable "to grab items" in the vehicle because he was "handcuffed and * * * in the back seat of the patrol car" at the time of the search. *McLaughlin*, 170 F.3d at 890-892; see *Weaver*, 433 F.3d at 1106-1107 (concluding that the *Belton* rule applied "where the arrestee was handcuffed and secured in a patrol car before police conducted the search"; citing *McLaughlin*).

On April 21, 2009, this Court's decision in *Gant* held that a search incident to the lawful arrest of a recent occupant of a vehicle may include the vehicle's passen-

ger compartment under *Belton* only when the "arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Gant*, 129 S. Ct. at 1719 (quoting *Thornton*, 541 U.S. at 632 (Scalia, J., concurring in the judgment)). The majority opinion in *Gant* thus "reject[ed]" the lower courts' widely accepted understanding of *Belton*. *Ibid.*

4. Meanwhile, respondent petitioned for a writ of certiorari. The government's response suggested that the Court hold his petition pending this Court's decision in *Gant*. Following that decision, the Court granted the petition, vacated the judgment, and remanded for further consideration in light of *Gant*. App., *infra*, 6a. On remand, the government conceded that, "[p]ursuant to *Gant*, the search of the vehicle was improper" because "the arrestee was handcuffed and secured in a patrol vehicle at the time of the search." Gov't Supp. C.A. Br. 3-4. The government argued, however, that respondent's conviction should be affirmed because suppression would be unwarranted in light of the good faith exception to the exclusionary rule. *Id.* at 4-9.[2]

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[2] After this Court rendered its decision in *Gant*, respondent moved the district court to order his release pending the completion of his appeal. The district court denied that motion. App., *infra*, 16a-22a. The court explained that respondent was "a daily-heroin user and gang associate" who already had acquired a significant history of criminal convictions before his sentencing and had since "amassed a disciplinary record" in prison by, *inter alia*, "assaulting a [prison] staff member, stabbing an inmate, and possessing contraband." *Id.* at 20a-21a. The court noted respondent's then-impeding transfer to a "Special Management Unit where he will be in 'lock down'" based on his prison record and explained that, given respondent's "troubling criminal and social history," it was unable to find clear and convincing evidence that

5. a. The court of appeals then reversed. App., *infra*, 1a-5a. After accepting the government's "conce[s-sion]" that the search was unlawful under *Gant*'s more restrictive reading of *Belton*, *id.* at 3a, the panel rejected the government's reliance on the good faith exception to the exclusionary rule. *Id.* at 3a-5a.

The panel observed that this Court has not yet applied the good faith exception when "a search [was] conducted under a then-prevailing interpretation of a Supreme Court ruling, but [was] rendered unconstitutional by a subsequent Supreme Court ruling announced while the defendant's conviction was on direct review." App., *infra*, 3a. It also explained that the Court has held that its Fourth Amendment decisions "retroactively" apply to searches in all cases on direct review at the time of decision. *Id.* at 4a (discussing *United States* v. *Johnson*, 457 U.S. 537 (1982), and *Griffith* v. *Kentucky*, 479 U.S. 314 (1987)). Based on those observations, the panel reasoned that applying the good faith exception in pending cases "would conflict with the Court's retroactivity precedents," which, the panel concluded, "require[] us to apply *Gant* to the current case without" that exception. *Ibid.*

The panel emphasized that its exclusionary rule holding was ultimately "concerned * * * with the Fourth Amendment rights of the defendant," App., *infra*, 5a n.1, and that applying the good faith exception here would improperly lead to disparate results by "treating similarly situated defendants" differently. *Id.* at 5a. Because the Arizona Supreme Court in *Gant* had "ordered the suppression of the evidence found as a result of the

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respondent would not "pose a danger to the community's safety if released" pending appeal. *Ibid.*

unconstitutional search" and this Court affirmed that judgment, the panel concluded that the same outcome was required here. *Ibid.*

b. The government petitioned for rehearing, arguing that the panel had erred in its good faith analysis and created a circuit conflict with both *United States* v. *McCane*, 573 F.3d 1037, 1042-1045 (10th Cir. 2009), cert. denied, 130 S. Ct. 1686 (2010), and *United States* v. *Jackson*, 825 F.2d 853, 865-866 (5th Cir. 1987) (en banc), cert. denied, 484 U.S. 1011, and 484 U.S. 1019 (1988). While that petition was pending, the Eleventh Circuit and the Utah Supreme Court held that the good faith exception to the exclusionary rule applies to pre-*Gant Belton* searches, expressly disagreeing with the panel's decision in this case. See *United States* v. *Davis*, 598 F.3d 1259, 1263-1268 (11th Cir. 2010), petition for cert. pending, No. 09-11328 (filed June 8, 2010); *State* v. *Baker*, 229 P.3d 650, 663-664 (Utah 2010).

The Ninth Circuit denied rehearing, with seven judges dissenting. App., *infra*, 23a-52a. Judge Betty Fletcher authored an opinion concurring in the denial of rehearing that the two other members of the panel joined. *Id.* at 24a-33a. Judge Bea authored a dissent that was joined by six other judges of the court of appeals. *Id.* at 33a-52a.

i. Judge Fletcher recognized that, before *Gant*, the Ninth Circuit had interpreted *Belton* to allow searches such as those in this case, and she acknowledged that the panel had previously held that the search here "did not violate the Fourth Amendment." App., *infra*, 24a. But, she reasoned, the Court in *Gant* determined that "our precedent had misinterpreted *Belton*" and, in addition, that the "deterrence of such searches [resulting from a court's subsequent exclusion of evidence] trumps

the costs of exclusion." *Id.* at 24a-25a. Judge Fletcher added that, in her view, the Court's 1982 decision in *Johnson* had confronted the "precise[]" question in this case and had "held that the exclusionary rule applied to cases pending on direct appeal." *Id.* at 30a; see *id.* at 27a-29a.

Judge Fletcher found it important to "bear in mind that this case deals with a defendant's right to suppress evidence obtained by an unconstitutional search." App, *infra*, 26a. Thus, in her view, the seven dissenting judges would incorrectly deny that "individual right[]" to suppression. *Ibid.*

ii. Judge Bea's dissent explained that the "exclusionary rule is not an individual right and applies only where it results in appreciable deterrence [of police misconduct]." App., *infra*, 34a (quoting *Herring* v. *United States*, 129 S. Ct. 695, 700 (2009)) (brackets in original). Judge Bea explained that this Court's decisions demonstrate that "the sole justification" for exclusion is "to deter future police misconduct," and, in light of that deterrence function, he was "at a loss to grasp how suppression of the evidence Officer Garcia discovered while properly doing his job, within the boundaries set by the law as it then existed, will deter other police officers from violating other individuals' Fourth Amendment rights." *Id.* at 34a, 37a. In his view, a "police officer's reliance on settled case law" was not "different from a police officer's reliance on a reasonable warrant (*Leon*) or statute (*Krull*)," circumstances in which this Court has applied the good faith exception. *Id.* at 36a (citing *United States* v. *Leon*, 468 U.S. 897 (1984), and *Illinois* v. *Krull*, 480 U.S. 340 (1987)); see *id.* at 40a-44a.

Judge Bea concluded that the Ninth Circuit's decision in this case "creates a split among the circuits" be-

cause its holding is "in direct conflict" with both *McCane* and *Jackson*. App., *infra*, 33a, 38a-39a, 44a-46a. He also concluded that the court's decision "disregards" and "conflict[s]" with *Herring*. *Id.* at 33a-34a. Judge Bea added that, "[i]f there is a silver lining to the panel's decision to flout Supreme Court case law in *Herring* and *Krull*, it is that the panel has set the stage for the Supreme Court to review the scope of the exclusionary rule." *Id.* at 38a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's refusal to apply the good faith exception to the exclusionary rule warrants this Court's review. Society expects police officers to try to comply with the law. A police officer who reasonably relies on settled circuit precedent that authorizes the search of a car acts entirely in objective good faith. That remains true even if a higher court later upsets the settled interpretation of the law and finds a violation. The question then becomes a remedial one: Should the evidence be suppressed? Under the logic of this Court's decisions, the answer is "no": Suppression of the fruits of the search in light of a subsequent change in the law cannot serve the purpose of the exclusionary rule, which is "to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring* v. *United States*, 129 S. Ct. 695, 702 (2009).

Despite these principles, the Ninth Circuit held that suppression is mandated because a new Fourth Amendment decision applies to all cases pending on direct review. That decision, which confuses the Fourth Amendment right with the exclusionary rule remedy, squarely conflicts with decisions of the Fifth, Tenth, and Eleventh

Circuits and the Utah Supreme Court. Those courts have correctly held that the good faith exception to the exclusionary rule applies when law enforcement officers conduct a search in objectively reasonable reliance on binding appellate precedent that, after the search, is overturned by this Court. Because the question presented in this case is both important and recurring, and because the Ninth Circuit's decision is wrong, this Court's resolution of the conflict is warranted.

A. The Ninth Circuit Erred In Refusing To Apply The Good Faith Exception

1. This Court recently emphasized that "the exclusionary rule is not an individual right" and "applies *only* where it 'result[s] in appreciable deterrence.'" *Herring*, 129 S. Ct. at 700 (emphasis added; brackets in original) (quoting *United States* v. *Leon*, 468 U.S. 897, 909 (1984)). Because the exclusion of probative evidence both imposes a "costly toll upon truth-seeking and law enforcement objectives" and "offends basic concepts of the criminal justice system" by "letting guilty and possibly dangerous defendants go free," the Court has made clear that "the benefits of deterrence must outweigh the costs" in order to warrant the exclusion of evidence obtained in violation of the Fourth Amendment. *Id.* at 700-701 (citations omitted). It is not sufficient that exclusion would have some deterrent effect. *Id.* at 702 n.4. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Id.* at 702. As a result, "evidence should be suppressed '*only* if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowl-

edge, that the search was unconstitutional under the Fourth Amendment.'" *Id.* at 701 (emphasis added) (quoting *Illinois* v. *Krull*, 480 U.S. 340, 348-349 (1987)).

2. Applying the exclusionary rule in this case would have no such deterrent effect. At the time Officer Garcia acted, his actions were in compliance with the law; there was no conduct to "deter" through the strong medicine of a suppression remedy. The Ninth Circuit was among the legion of courts that had interpreted *New York* v. *Belton*, 453 U.S. 454 (1981), "to allow a vehicle search incident to the arrest of a recent occupant even if there [was] no possibility the arrestee could gain access to the vehicle at the time of the search." *Arizona* v. *Gant*, 129 S. Ct. 1710, 1718 (2009). Justice Scalia's concurring opinion in *Thornton* v. *United States*, 541 U.S. 615 (2004), specifically illustrates the "legion" of decisions so holding by citing the Ninth Circuit's decision in *McLaughlin*. See *id.* at 628 (Scalia, J., concurring). And five members of this Court in *Gant* concluded that the lower courts had, in fact, adopted the best understanding of *Belton*'s rule.[3] That pre-*Gant* understanding of the *Belton* rule accorded with what "ha[d] been widely taught in police academies" for over a quarter century and had been followed by law enforcement officers in the field "in conducting vehicle searches during [that

[3] For Justice Scalia, the lower courts had adopted the best reading of "the rule set forth in * * * *Belton*" as "automatically permitting a [vehicle] search when the driver or an occupant is arrested," *Gant*, 129 S. Ct. at 1724 (Scalia, J., concurring), but he concurred in the majority opinion in order to provide the Court with a majority for its decision. *Id.* at 1725 (explaining that "a 4-to-1-to-4 opinion" would be unacceptable). The four dissenting Justices agreed with that reading of *Belton* and would have retained it. See *id.* at 1725 (Breyer, J., dissenting); *id.* at 1726-1727 (Alito, J., dissenting) (joined by the Chief Justice, Justice Kennedy, and, in pertinent part, Justice Breyer).

period]." *Gant*, 129 S. Ct. at 1722; see *id.* at 1718; cf. 3 Wayne R. LaFave, *Search and Seizure* § 7.1(c) at 517 & n.89 (4th ed. 2004) ("[U]nder *Belton* a search of the vehicle is allowed even after the defendant was removed from it, handcuffed, and placed in the squad car.") (collecting cases).

Before *Gant*, a trained officer in Officer Garcia's position would have had an objectively reasonable belief that a search of the car was authorized incident to the occupant's custodial arrest. Even the court of appeals thought so before *Gant*: The panel in this case held the very same search to be "a lawful search incident to the arrest of passenger Rivera." App., *infra*, 8a. Officer Garcia thus did not engage in any culpable conduct. To the contrary, law enforcement officers must be able to follow governing precedents in performing their public functions and should be encouraged to do so. See *id.* at 36a-37a (Bea, J., dissenting) (citing *United States* v. *Peltier*, 422 U.S. 531, 542 (1975)). Suppression of evidence when an officer follows the law as expounded in governing appellate precedent would serve no valid purpose under this Court's exclusionary rule precedents.

3. In comparable settings, this Court has often held that suppression is not an appropriate remedy for an unconstitutional search. In *Leon*, the Court declined to require suppression when an officer reasonably relied on an invalid warrant to conduct the search because "[p]enalizing the officer for the [court's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." 468 U.S. at 920-921. The same holding applies when an officer relies on a statute later declared invalid, *Krull*, *supra*; on judicial records that erroneously reflect an outstanding warrant, *Arizona* v. *Evans*, 514 U.S. 1 (1995); or on the police's

own warrant database that, through police negligence, erroneously contains a withdrawn warrant. *Herring*, 129 S. Ct. at 704. And an equal result must occur when an officer reasonably relies on the court of appeals' then-binding precedent to conduct a search. The fact that appellate precedent is later overturned is not enough to justify suppression, since the "exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges," *Leon*, 468 U.S. at 916, and there is "no meaningful distinction" between relying on an invalid search warrant issued by a court and relying on settled precedent that, at the time of the search, held such warrantless searches to be lawful. *United States* v. *Davis*, 598 F.3d 1259, 1266 (11th Cir. 2010), petition for cert. pending, No. 09-11328 (filed June 8, 2010); see *United States* v. *McCane*, 573 F.3d 1037, 1044 (10th Cir. 2009), cert. denied, 130 S. Ct. 1686 (2010).

Gant itself underscored the reasonableness of an officer's reliance on settled law, even if that law is later overturned. The Court noted that qualified immunity will shield officers from liability in civil suits challenging unconstitutional vehicle searches conducted before *Gant* because such officers acted in "reasonable reliance" on the then-prevailing and "widely accepted" understanding of *Belton*. 129 S. Ct. at 1722 n.11. That observation directly supports the conclusion that the good faith exception to the exclusionary rule applies in criminal prosecutions because the qualified immunity test turns on the same standard of reasonableness as the good faith exception. See *Groh* v. *Ramirez*, 540 U.S. 551, 565 n.8 (2004) (citing *Malley* v. *Briggs*, 475 U.S. 335, 344 (1986)); see also *Davis*, 598 F.3d at 1264 n.4.

4. The court of appeals erred in concluding that suppression was compelled by this Court's decisions in

United States v. *Johnson*, 457 U.S. 537 (1982), *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), and *Gant*. *Johnson* and *Griffith* hold that this Court's new constitutional decisions govern the legality of criminal procedures at issue in all cases that, at the time, are still pending on direct review. Those decisions reflect "the principle that this Court does not disregard current law" when it adjudicates such cases. *Griffith*, 479 U.S. at 323, 326 (citing *Johnson*, 457 U.S. at 456-457 & n.16). That retroactivity jurisprudence, however, is not at all about the good faith exception to the exclusionary rule. Indeed, this Court had not even recognized the good faith exception at the time of *Johnson*; it did so only two years later when it decided *Leon*. See *Leon*, 468 U.S. at 905, 913 & n.11, 918-920; *id.* at 927 (Blackmun, J., concurring). And unlike the rights established by the Fourth Amendment, individuals have no personal right to suppression of evidence. *Herring*, 129 S. Ct. at 700. Rather, "[t]he question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Illinois* v. *Gates*, 462 U.S. 213, 223 (1983); accord *Herring*, 129 S. Ct. at 700; *Hudson* v. *Michigan*, 547 U.S. 586, 591-592 (2006); *Evans*, 514 U.S. at 10; *Leon*, 468 U.S. at 906; *Davis*, 598 F.3d at 1263; see *McCane*, 573 F.3d at 1044 n.5.

Because of its misinterpretation of *Griffith* and *Johnson* and its assumption that the question before it pertained to the substance of Fourth Amendment rights, the court of appeals disregarded well-established principles requiring consideration of deterrence before suppressing evidence. The court emphasized, for instance, that its suppression decision "concerned * * * the

Fourth Amendment rights of [respondent]." App., *infra*, 5a n.1. Judge Fletcher's opinion for the panel concurring in the denial of rehearing confirms the panel's view that this case concerns respondent's "right to suppress evidence obtained by an unconstitutional search." *Id.* at 26a. But this Court has long held that "the exclusionary rule is not an individual right." *Herring*, 129 S. Ct. at 700; see, *e.g.*, *Krull*, 480 U.S. at 347; *Leon*, 468 U.S. at 906; *Stone* v. *Powell*, 428 U.S. 465, 486, 495 n.37 (1976). The rule is simply a "judicially created remedy," *Leon*, 468 U.S. at 906 (quoting *United States* v. *Calandra*, 414 U.S. 338, 348 (1974)), that "has never been applied except 'where its deterrence benefits outweigh its 'substantial social costs.'" *Hudson*, 547 U.S. at 594 (quoting *Pennsylvania Bd. of Probation & Parole* v. *Scott*, 524 U.S. 357, 363 (1998)).

Nothing in the Court's *Gant* decision justifies an exemption from this Court's good faith precedent, as the court of appeals believed. See App, *infra*, 5a; see *id.* at 33a (B. Fletcher, J., concurring in the denial of rehearing en banc). *Gant* had no occasion to address remedial issues because the question presented in *Gant* addressed only the underlying Fourth Amendment issue governing the constitutionality of the vehicle search. See Pet. at i, *Gant*, *supra* (No. 07-542). The State's briefs on the merits thus focused entirely on that constitutional question and did not suggest, much less argue as an alternative, that the good faith exception would warrant reversal. See Pet. Br. at 15-44, *Gant*, *supra*; Reply Br. at 1-30, *Gant*, *supra*; see also *Davis*, 598 F.3d at 1264. Judge Fletcher's concurrence quotes from Justice Alito's dissenting opinion in *Gant* and the response of the *Gant* majority. App., *infra*, 31a-32a. But those quotations addressed reliance interests and *stare decisis*

principles; they did not address the propriety of suppression or cite any of the Court's suppression decisions. See *Gant*, 129 S. Ct. 1722-1723; *id.* at 1728 (Alito, J., dissenting).

B. The Ninth Circuit's Holding Creates A Conflict In the Circuits

The Fifth, Tenth, and Eleventh Circuits and the Utah Supreme Court have held that the good faith exception to the exclusionary rule applies where, as here, law enforcement officers have conducted searches in objectively reasonable reliance on binding appellate precedent that is subsequently overruled. See *Davis*, 598 F.3d at 1263-1268 ("hold[ing] that the exclusionary rule does not apply when the police conduct a search in objectively reasonable reliance on our well-settled precedent, even if that precedent is subsequently overturned"; concluding that the Ninth Circuit panel's contrary decision in this case was not "persuasive"); *McCane*, 573 F.3d at 1042-1045 & n.5 (holding that the exclusionary rule does not apply "when law enforcement officers act in objectively reasonable reliance upon the settled case law of a United States Court of Appeals" because such reliance "certainly qualifies as objectively reasonable law enforcement behavior" and because of "[t]he lack of deterrence likely to result" from suppression); *United States* v. *Jackson*, 825 F.2d 853, 865-866 (5th Cir. 1987) (en banc) (holding that "the exclusionary rule should not be applied to searches which relied on Fifth Circuit law prior to [a] change in that law" because "exclusion would have no deterrent effect" in that context), cert. denied, 484 U.S. 1011, and 484 U.S. 1019 (1988); *State* v. *Baker*, 229 P.3d 650, 663-664 (Utah 2010) (following *McCane* and rejecting the panel's decision in

this case); cf. App, *infra*, 33a-52a (Bea, J., dissenting from the denial of rehearing en banc) (opinion for seven judges agreeing with *McCane* and *Jackson*). Three of those decisions—*Davis*, *McCane*, and *Baker*—specifically concluded that the good faith exception applies where evidence was obtained from vehicle searches incident to arrests conducted pursuant to settled (pre-*Gant*) appellate precedent.[4]

The Ninth Circuit's contrary decision in this case creates a division of authority. Although *McCane* predated the panel's decision by a month, neither the panel's decision nor Judge Fletcher's concurring opinion respecting rehearing acknowledges the contrary hold-

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[4] In *United States* v. *Debruhl*, 993 A.2d 571 (D.C. 2010), petition for reh'g pending (filed May 20, 2010), the D.C. Court of Appeals also agreed that the good faith exception applies "when a Supreme Court ruling upsets clearly settled law on which [a law enforcement] officer had reasonably relied before the high Court's decision." *Id.* at 578. But the court concluded that its own pre-*Gant* interpretation of the *Belton* rule for vehicle searches was not sufficiently settled to warrant application of the good faith exception. *Id.* at 586 (explaining that the D.C. Court of Appeals "might well have held the search of Debruhl's car unlawful and the evidence inadmissible" before *Gant*). The government's rehearing petition in *Debruhl* is pending.

The Wisconsin Supreme Court has similarly held that the good faith exception applies where officers have executed a search warrant consistent with the state supreme court's then-existing precedent allowing no-knock entries for all searches involving felony drug dealing, even though this Court subsequently overturned that per se rule in *Richards* v. *Wisconsin*, 520 U.S. 385, 388 (1997). See *State* v. *Ward*, 604 N.W.2d 517, 526-529 (Wis. 2000). *Ward*'s rationale thus closely parallels that of the decisions discussed above. In its own context, however, *Ward* has limited prospective application in light of this Court's holding that a violation of the knock-and-announce rule will not require suppression when, as in *Ward*, the police are executing a valid search warrant. See *Hudson*, 547 U.S. at 590-599.

ings of the other courts of appeals. See App., *infra*, 1a-5a; *id.* at 24a-33a. The court, however, was aware of the conflict when it denied rehearing en banc over seven dissents. See *id.* at 33a, 44a-46a (Bea, J, dissenting) (explaining the conflict). And the Colorado Supreme Court has recently issued a divided opinion that follows the Ninth Circuit's decision in this case and self-consciously creates an intra-state conflict in Colorado with the Tenth Circuit. *People* v. *McCarty*, 229 P.3d 1041, 1044 (Colo. 2010) (following the Ninth Circuit's decision in this case and not *McCane*); see *id.* at 1043-1046.

The division of authority is now entrenched and merits this Court's review. Although the United States previously opposed certiorari in *McCane*, it did so before the Ninth Circuit had denied the government's rehearing petition in this case and before any other decision had created a lasting division of authority. See Br. in Opp. at 10-11, *McCane*, *supra* (No. 09-402) (explaining that review would be premature because the Ninth Circuit might "eliminate the current conflict on the question presented" if it were to grant the government's then-pending petition for rehearing). Now that the Ninth Circuit has denied en banc rehearing and the Colorado Supreme Court has followed its lead, an intractable division of authority exists. See App., *infra*, 33a, 38a (Bea, J., dissenting from the denial of rehearing en banc) (explaining that the Ninth Circuit "create[d] a split among the circuits" that has "set the stage for the Supreme Court to review the scope of the exclusionary rule").

C. The Application Of The Good Faith Exception Presents An Important And Enduring Legal Question

The conflict over suppression motions arising from pre-*Gant* searches is itself important. Because officers routinely conducted vehicle searches incident to arrest under the pre-*Gant* understanding of *Belton*, the good-faith-exception question presented in this case is pending in numerous federal and state courts around the country. See, *e.g.*, *United States* v. *Shakir*, No. 09-2665 (3d Cir.) (argued Apr. 13, 2010); *United States* v. *Wilks*, No. 09-5166 (4th Cir.) (briefing completed May 10, 2010); *United States* v. *Peoples*, 668 F. Supp. 2d 1042, 1045, 1047-1051 (W.D. Mich. 2009), appeal pending, No. 09-2507 (6th Cir.) (briefing completed June 1, 2010); *United States* v. *Salamasina*, No. 09-2186 (8th Cir.) (argued Jan. 15, 2010); *People* v. *Branner*, No. S179730 (Cal.) (review granted Mar. 10, 2010); *State* v. *Littlejohn*, No. 2007AP0900-CR (Wis.) (argued Apr. 13, 2010).

More broadly, the basic principles of this Court's exclusionary rule jurisprudence are designed to strike a proper balance between the interest in deterring culpable police conduct and the protection of society from criminal conduct uncovered during a search. This Court has recently decided two cases examining the exclusionary rule in order to ensure that the balance is properly struck, see *Herring*, *supra*; *Hudson*, *supra*, and has decided many cases applying the good faith exception. Further consideration in the lower courts is not likely to advance significantly this Court's consideration of the question presented. This case cleanly presents that question and provides an ideal vehicle for the Court to resolve the division of authority. This Court's review is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2010

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-30098

D.C. No. CR-06-02112-EFS

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RICARDO GONZALEZ, DEFENDANT-APPELLANT

Filed: Aug. 24, 2009

On Remand From The United States Supreme Court

OPINION

Before: BETTY B. FLETCHER, RICHARD A. PAEZ and N. RANDY SMITH, Circuit Judges.

B. FLETCHER, Circuit Judge.

We review this appeal for the second time on remand from the United States Supreme Court. The Court on May 4, 2009 granted certiorari, and vacated and remanded our disposition for further consideration in light of its recent decision in *Arizona v. Gant*, 129 S. Ct. 1710 (2009). We hold that *Gant* requires that Appellant

Ricardo Gonzalez's motion to suppress be granted and, therefore, Gonzalez's conviction be reversed.

Gonzalez had previously been convicted of Possession of a Firearm and Ammunition by a Prohibited Person, in violation of 18 U.S.C. § 922(g)(1). Gonzalez's conviction resulted from a firearm found during a June 19, 2006 traffic stop of a car in which Gonzalez was riding. The police, following the arrest of another passenger for outstanding warrants, searched the passenger compartment of the car and discovered a loaded 9 millimeter Beretta firearm inside the glovebox. Gonzalez filed a motion to suppress, asserting the search of the car violated his Fourth Amendment rights, which the district court denied. Following his conviction on November 28, 2006, Gonzalez appealed his conviction and sentence, asserting in part that the denial of his motion to suppress was in error. We affirmed the district court on all aspects of the appeal. *United States v. Gonzalez*, 290 Fed. Appx. 51 (9th Cir. Aug. 7, 2008). Our ruling affirming denial of the motion to suppress rested on the Supreme Court's holding in *New York v. Belton*, 453 U.S. 454, 460 (1981), which has been read by our court as permitting a warrantless vehicle search incident to the arrest of an occupant of the vehicle. *Gonzalez*, 290 Fed. Appx. at 52; *see United States v. Weaver*, 433 F.3d 1104, 1106 (9th Cir. 2006) ("Applying the *Belton* rule, we have held that a warrantless automobile search will be valid if it is 'roughly contemporaneous with the arrest.'").

In *Gant*, the Court affirmed the Arizona Supreme Court's holding that the broad reading of *Belton* by our and other courts was error. Reading *Belton* more narrowly, the Court announced as the rule for vehicle searches incident to arrest: "Police may search a vehicle

incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies." *Gant*, 129 S. Ct. at 1723-24. The Government concedes that, under the Supreme Court's current reading of *Belton* stated in *Gant*, the search of Gonzalez's vehicle was improper because Gonzalez was handcuffed and secured in a patrol vehicle at the time of the search of the vehicle. However, the Government asserts nonetheless that the search was in good faith under the then-prevailing interpretation of *Belton* and that, therefore, the exclusionary rule should not be applied.

The Government's assertion is not directly supported by our current case law. The Government relies on the Supreme Court's recent decision in *Herring v. United States*, 129 S. Ct. 695 (2009), which applied the good faith exception of *United States v. Leon*, 468 U.S. 897 (1984), in holding that whether the exclusionary rule should be applied to a search in violation of the Fourth Amendment "turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct." *Herring*, 129 S. Ct. at 698. Neither the Supreme Court nor our court, however, has applied the good faith exception to the scenario we face: a search conducted under a then-prevailing interpretation of a Supreme Court ruling, but rendered unconstitutional by a subsequent Supreme Court ruling announced while the defendant's conviction was on direct review. The cases the Government relies on involve application of the good

faith exception to searches conducted in reliance on a warrant held invalid following the search; *see, e.g.*, *Herring* 129 S. Ct. at 698; or a statute or regulation subsequently found unconstitutional during direct review of the defendant's conviction; *see, e.g.*, *Illinois v. Krull*, 480 U.S. 340 (1987); *United States v. Peltier*, 422 U.S. 531 (1975); *United States v. Meek*, 366 F.3d 705 (9th Cir. 2004).

We conclude, however, that this case should be controlled by long-standing precedent governing the applicability of a new rule announced by the Supreme Court while a case is on direct review. The Court has held that "a decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered." *United States v. Johnson*, 457 U.S. 537, 562 (1982); *see Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (finding that even decisions constituting a "clear break" with past precedent have retroactive application). This precedent requires us to apply *Gant* to the current case without the overlay of an application of the good faith exception. To hold that *Gant* may not be fully applied here, as the Government urges, would conflict with the Court's retroactivity precedents.

Such a ruling would undermine the rationale of *Johnson* and *Griffith*. As stated in *Griffith*, "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." 479 U.S. at 314. It would violate "the integrity of judicial review" by turning the court into, in effect, a legislative body announcing new rules but not applying them, rather than acting in our proper role as an adjudicative body deciding cases. It also would

"violate[ ] the principle of treating similarly situated defendants the same" by allowing only one defendant to be the beneficiary of a newly announced rule. *Id.* at 322-23. In *Gant*, the Supreme Court upheld in full the decision of the Arizona Supreme Court, which not only found the search at issue unconstitutional, but ordered the suppression of the evidence found as a result of the unconstitutional search. *See Gant*, 129 S. Ct. at 1724; *State v. Gant*, 162 P.3d 640, 646 (Ariz. 2007). Hence, refusal to allow Gonzalez similarly to benefit from the Court's ruling in *Gant* through application of the exclusionary rule would implicate the same concerns mandating the Court's holding in *Griffith*.[1]

Because both *Johnson* and *Griffith* remain binding precedent, we cannot apply the good faith exception here without creating an untenable tension within existing Supreme Court law. We, therefore, hold that evidence derived from the search at issue must be suppressed and reverse Gonzalez's conviction.[2]

REVERSED AND REMANDED.

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[1] We are concerned here with the Fourth Amendment rights of the defendant. We do not consider whether the police officers are entitled to qualified immunity in a 42 U.S.C. § 1983 civil rights action.

[2] To the extent that our opinion conflicts with our previous holding in *United States v. Osife*, 398 F.3d 1143 (9th Cir. 2005), we decline to follow *Osife* in light of the Supreme Court's decision in *Gant*. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (holding that "a three-judge panel of this court and district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled").

APPENDIX B

UNITED STATES SUPREME COURT

No. 08-7096

UNITED STATES OF AMERICA, PETITIONER

v.

RICARDO GONZALEZ

May 4, 2009

CERTIORARI—SUMMARY DISPOSITIONS

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* * * * *

08-7096 QUINTANA, ALEXANDER V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Arizona* v. *Gant*, 556 U.S. ___ (2009).

* * * * *

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-30098

D.C. No. CR-06-02112-EFS

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RICARDO GONZALEZ, DEFENDANT-APPELLANT

[Filed: Aug. 7, 2008]

Appeal from the United States District Court for the Eastern District of Washington
Edward F. Shea, District Judge, Presiding

MEMORANDUM*

Before: B. FLETCHER, PAEZ, and N.R. SMITH, Circuit Judges.

Defendant Gonzalez appeals his conviction for Possession of a Firearm and Ammunition by a Prohibited Person, in violation of 18 U.S.C. § 922(g)(1). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

First, the district court did not err in denying Gonzalez's motion to suppress the seized gun. That Officer Garcia asked a few questions of the vehicle's passengers that went beyond the scope of what was necessary for issuing a citation did not, without more, violate Gonzalez's Fourth Amendment rights. *See Muehler v. Mena*, 544 U.S. 93, 101 (2005); *United States v. Mendez*, 476 F.3d 1077, 1080 (9th Cir. 2007). Moreover, Officer Garcia's brief and apparently unintentional prolongation of the traffic stop by running the passengers' names through the "wants and warrants" database was not unreasonable under the circumstances. *See United States v. Turvin*, 517 F.3d 1097, 1103 (9th Cir. 2008).

Second, Gonzalez concedes that Officer Garcia's search of the passenger compartment of the vehicle, including the unlocked glove box, was a lawful search incident to the arrest of passenger Rivera under *New York v. Belton*, 453 U.S. 454, 460 (1981). *See United States v. Weaver*, 433 F.3d 1104, 1106 (9th Cir. 2006).

Third, the district court did not abuse its discretion and did not violate Gonzalez's rights under the Confrontation Clause by barring Gonzalez from cross-examining government witness Davila. Davila's cooperation agreement with state authorities concerning an unrelated crime was not relevant to Gonzalez's federal criminal case. *See United States v. James*, 139 F.3d 709, 713 (9th Cir. 1998). Moreover, the fact of Davila's arrest, combined with her inconsistent testimony as to her knowledge about the gun, left the jury with sufficient information to assess her credibility. *See id.*

Finally, the district court did not err in enhancing Gonzalez's offense level under United States Sentencing Guidelines § 2K2.1(a)(4)(A) on the ground that his pri-

or conviction for residential burglary under section 9A.52.025(1) of the Revised Code of Washington constituted a "crime of violence." While a Washington residential burglary conviction is not categorically a "burglary of a dwelling" (and thus a "crime of violence" under U.S.S.G. § 4B1.2(a)(2)), *see United States v. Wenner*, 351 F.3d 969, 972-73 (9th Cir. 2003), the district court properly applied the modified categorical approach under *Taylor v. United States*, 495 U.S. 575, 602 (1990), in concluding that Gonzalez's prior residential burglary conviction did, in fact, constitute a "burglary of a dwelling." The Information alleged that Gonzalez had "entered or remained unlawfully in a dwelling other than a vehicle, located at 480 Coe Road, Wapato, Washington, the residence of Shawn Klingele." Gonzalez admitted the truthfulness of the allegation in his guilty plea. *See United States v. Rodriguez-Rodriguez*, 393 F.3d 849, 857 (9th Cir. 2005). On the basis of this admission, the district court properly determined that Gonzalez had burglarized a "building or structure" and thus had been convicted of a "burglary of a dwelling." *See United States v. Guerrero-Velasquez*, 434 F.3d 1193, 1197 (9th Cir. 2006). Accordingly, the enhancement under U.S.S.G. § 2K2.1(a)(4)(A) was warranted.

AFFIRMED.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

No. CR-06-2112-EFS

UNITED STATES OF AMERICA, PLAINTIFF

v.

RICARDO GONZALEZ, DEFENDANT

Filed: Nov. 13, 2006

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS and RULING ON DISCOVERY MOTIONS

A Pretrial Conference was held in the above-captioned matter on November 1, 2006, in Yakima, Washington. Defendant Ricardo Gonzalez was present, represented by Rebecca Pennell. Assistant United States Attorney Thomas Hanlon appeared on behalf of the Government. Before the Court were Defendant's Motion to Suppress (Ct. Rec. 23), Defendant's Motion for Discovery (Ct. Rec. 27), Defendant's Motion to Disclose Evidence Pursuant to Fed. R. Evid. 404 & 609 (Ct. Rec. 29), and Defendant's Motion to Compel Grand Jury Transcripts (Ct. Rec. 31). In connection with Defendant's motion to suppress, the Court heard testimony from Yakima Police Department Officer Andy Garcia. After hearing testimony and argument of counsel, the Court

determined further briefing was necessary and ordered the parties to submit supplemental briefs. After reviewing the submitted briefs, the Court is fully informed and denies Defendant's suppression motion. This Order also serves to memorialize the Court's oral rulings on the discovery motions.

A. Defendant's Motion to Suppress

Defendant asks the Court to suppress the evidence obtained as a result of a search that took place prior to his arrest on June 19, 2006.

1. *Factual Background*[1]

On June 19, 2006, at 2:18 a.m., Officer Garcia, who has been an officer with the Yakima Police Department for approximately eleven years, observed a red Pontiac being driven without its rear license plate illuminated. Officer Garcia conducted a traffic stop due to this traffic infraction, and he called for back-up units upon observing four occupants seated inside the vehicle. After stopping the vehicle, Officer Garcia made contact with the driver, who identified herself as Elizia Davilla. Officer Garcia asked her if the vehicle was hers, whether she was aware that the license plate was not illuminated, and what she was doing driving around at that hour; Ms. Davilla answered these questions. Officer Garcia then asked the other occupants of the car what their names were and whether they had any identification; at some point during this questioning he mentioned that the occupants did not need to give him this information. The occupants identified themselves, and Officer Garcia tes-

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[1] This Factual Background is based on the submitted exhibits and the testimony of Officer Garcia, which the Court found credible.

tified that at no time did the occupants make any furtive movements.

Officer Garcia then went back to his police vehicle and ran each of the names through a federal and state "wants and warrants" database; a process that took approximately eight minutes in total. (Ct. Rec. 41: Ex. E.) After running the names, Officer Garcia learned that two outstanding warrants existed for one of the occupants of the vehicle, Silviano Rivera. Officer Garcia shared this information with Officer Michael Henne, who had arrived on the scene; Mr. Rivera was taken into custody. Officer Garcia then confirmed with dispatch that the warrants were still valid. Officer Henne transported Mr. Rivera to the police station.

Officer Garcia had the other occupants step outside the vehicle and conducted a search of the interior of the vehicle. Officer Garcia found a firearm in the unlocked glove compartment and entered the serial number of the firearm into the computer databases. Officer Garcia asked the driver of the vehicle and the other female occupant about the firearm; both woman advised Officer Garcia that the gun belonged to Mr. Gonzalez as he had made comments about the firearm prior to the officer stopping the vehicle. Officer Garcia arrested Mr. Gonzalez for being a felon in possession of a firearm.

2. *Whether Officer Garcia impermissibly expanded the scope of the stop*

The Court finds the traffic stop was based on probable cause and therefore the initial seizure was legal. *See Illinois v. Caballes*, 543 U.S. 405, 407 (2005); *New York v. Class*, 475 U.S. 106, 117-18 (1986). However, a lawful seizure can become unlawful if the detention is not carefully tailored to the reasons for the stop. *Illinois*, 543

U.S. at 407; *United States v. Mendez*, — F.3d —, 2006 WL 3055905 at *2. "During a traffic stop, a police officer may only 'ask questions that are reasonably related in scope to the justification for his initial contact.'" *Mendez* at *2 (quoting *United States v. Murillo*, 255 F.3d 1169, 1174 (9th Cir. 2001)).

Defendant argues Officer Garcia impermissibly expanded the scope of the seizure by requesting that the occupants provide their name and identification. The Court disagrees. Although Officer Garcia's identification-related questions to the occupants were not tied directly to the reason for the stop—the unilluminated license plate, the Court determines Officer Garcia appropriately asked the occupants for their names and identification under *Florida v. Bostwick*, 501 U.S. 429, 435 (1991) ("[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual [and] ask to examine the individual's identification. . . ." (citations omitted)). Also, Officer Garcia's identification-related questions did not unreasonably prolong the detention of the vehicle. The stop of the vehicle occurred at 2:18:42 and Officer Garcia had completed running the names at approximately 2:30. Accordingly, only twelve minutes had passed from the time the vehicle was stopped to the time Officer Garcia had completed running the names (and learned that an occupant had outstanding warrants). The Court concludes Officer Garcia did not impermissibly expand the scope of the search. *See United States v. Muriel*, 418 F.3d 720, 725-26 (7th Cir. 2005).

3. *Whether there was probable cause to arrest Mr. Rivera*

Defendant submits probable cause was lacking to arrest Silviano Rivera because Officer Garcia did not confirm the outstanding warrants with dispatch until after Mr. Rivera was taken into custody. The Court finds otherwise; Officer Garcia had probable cause to arrest Mr. Rivera after running his name through the database and learning that outstanding warrants existed. *See Arizona v. Evans*, 115 S. Ct. 1185 (1995); *United States v. Murphy*, 17 Fed. Appx. 545 (9th Cir. 2001); *United States v. Ellison*, 462 F.3d 557, 563 (6th Cir. 2006); *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 529 (5th Cir. 1999).

3. *Whether the search of the car was legal*

Because Officer Garcia had probable cause to arrest Mr. Rivera, Officer Garcia had the authority under *New York v. Belton*, 453 U.S. 454, 460 (1981), to search the vehicle incident to Mr. Rivera's arrest, including the glove compartment. Defendant argues the Supreme Court decision in *Thornton v. United States*, 124 S. Ct. 2127, 2132 (2004), limited the *Belton* rule to those cases where law enforcement had reason to believe that evidence of the crime for which the individual was arrested would be found in the vehicle. However, Defendant recognizes the Ninth Circuit has not yet interpreted *Thornton* as over-ruling the rule set forth in Belton, *see United States v. Osife*, 398 F.3d 1143, 1147 (9th Cir. 2005); therefore, Mr. Gonzalez seeks merely to preserve this issue for appeal.

B. Defendant's Discovery Motions

The Court orally granted Defendant's Motion for Discovery and Motion to Disclose Evidence Pursuant to Fed. R. Evid. 404 & 609, highlighting that the Government advised it disclosed all such information. In addition, the Court granted in part Defendant's other discovery motion, ordering the Government to disclose the grand jury transcripts one week before trial.

Accordingly, **IT IS HEREBY ORDERED:**

1. Defendant's Motion to Suppress **(Ct. Rec. 23)** is **DENIED.**

2. Defendant's Motion for Discovery **(Ct. Rec. 27)** is **GRANTED.**

3. Defendant's Motion to Disclose Evidence Pursuant to Fed. R. Evid. 404 & 609 **(Ct. Rec. 29)** is **GRANTED.**

4. Defendant's Motion to Compel Grand Jury Transcripts **(Ct. Rec. 31)** is **GRANTED IN PART** (Government is to disclose one week before trial).

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and to provide copies to all counsel.

DATED this 9th day of November 2006.

/s/ EDWARD F. SHEA
EDWARD F. SHEA
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

No. CR-06-02112-EFS

UNITED STATES OF AMERICA, PLAINTIFF

v.

RICARDO GONZALEZ, DEFENDANT

Filed: May 12, 2009

ORDER DENYING DEFNDANT'S MOTION FOR RELEASE PENDING APPEAL

Before the Court, without oral argument, is Defendant Ricardo Gonzalez' Motion for Release Pending Appeal (Ct. Rec. 116), in which he seeks release pending the completion of his *Arizona v. Gant*[1]-based appeal. The Government opposes the motion. (Ct. Rec. 128.) After reviewing the submitted material, the prior suppression-related materials, the presentence investigation report, and relevant authority, the Court is fully informed. For the reasons given below, the Court denies Defendant's motion.

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[1] — S. Ct. —, 2009 WL 1045962 (April 4, 2009).

A. Background

After the Court denied Defendant's suppression motion, which sought to suppress a firearm discovered during a traffic stop of a vehicle in which Defendant was a passenger, a jury found Defendant guilty of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). (Ct. Recs. 48 & 84.) The Court sentenced Defendant to seventy (70) months. (Ct. Rec. 98.) Defendant appealed his conviction and sentence, and the Ninth Circuit affirmed. (Ct. Recs. 100, 114, & 115.)

On April 21, 2009, the U.S. Supreme Court issued *Gant*, which altered the Ninth Circuit's interpretation of a law enforcement officer's authority to search a vehicle under *New York v. Belton*, 453 U.S. 454 (1981)—an interpretation the Court relied on in its decision not to suppress. Defendant filed the instant motion on April 27, 2009, and also filed a writ for certiorari with the U.S. Supreme Court, which was granted on May 4, 2009.

B. Authority and Analysis

A court must order the detention of a person found guilty of a crime and sentenced to imprisonment, unless the court finds:

(A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and

(B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—

(i) reversal

(ii) an order for a new trial,

(iii) a sentence that does not include a term of imprisonment, or

(iv) a reduced sentence to a term or imprisonment less than the total of the time already served plus the expected duration of the appeal process.

18 U.S.C. § 3143(b)(1).

1. *Appeal*

Taking the second requirement first, the Court finds that Defendant's appeal is not for delay purposes and that it raises a substantial question of law likely to result in a new trial. An issue is "substantial" under § 3143(b)(1)(B) if it is "fairly debatable," "fairly doubtful," or "of more substance than would be necessary to a finding that it was not frivolous." *United States v. Garcia*, 340 F.3d 1013, 1021 n.5 (9th Cir. 2003) (citing *United States v. Handy*, 761 F.2d 1279, 1283 (9th Cir. 1985)). Thus, "in other words, [the defendant] need not . . . present an appeal that will likely be successful, only a non-frivolous issue that, if decided in the defendant's favor, would likely result in reversal or could satisfy one of the other conditions." *Id.*

Before trial, the Court denied Defendant's motion to suppress the firearm discovered in the vehicle Defendant was a passenger in. Defendant contends that the suppression ruling was clearly erroneous in light of the recently-decided *Gant*.

In *Gant*, the Supreme Court rejected a broad reading of the search incident to arrest rule—a reading that had been adopted by the Ninth Circuit subsequent to *New York v. Belton*, 453 U.S. 454 (1981). The Supreme Court determined that a police officer's automobile search incident to arrest authority is limited to 1) the recently-occupied passenger compartment space within the unsecured arrestee's immediate control, i.e., "the area from within which [the unsecured arresteee] might gain possession of a weapon or destructible evidence," or 2) when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle. 2009 WL 1045962 at 2 (citing to *Chimel v. California*, 395 U.S. 752 (1969)). The Supreme Court also recognized that an officer is still permitted to search a vehicle without a warrant "when he has reasonable suspicion that an individual, whether or not the arrestee, is 'dangerous' and might access the vehicle to 'gain immediate control of weapons.'" *Id.* at 9 (citing to *Michigan v. Long*, 463 U.S. 1032, 1049 (1983)). These Fourth Amendment warrant requirement exceptions were "derived[d] from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Id.* at 5.

The Government contends that *Gant* is factually distinguishable because here the two (2) police officers were confronted with safely handling three (3) non-handcuffed individuals outside of their vehicle, with only the arresteee being handcuffed and placed in a police vehicle. The Court is cognizant of the factual differences between this case and *Gant*; however, a *Chimel-Gant* search incident to arrest is only permitted when the *arrestee*—here, Silviano Rivera, not Defendant—might gain access to a weapon in the vehicle. After being arrested, Mr. Rivera was handcuffed and placed in

the back of the vehicle; accordingly, there was no safety concern relating to the arrestee. Furthermore, there was no reason to believe that evidence of Mr. Rivera's arrest, which was based solely on two outstanding warrants (the basis of which was unidentified in the record), would be found in the vehicle stopped for an unilluminated license plate. Therefore, it is likely the reviewing court will decide that a search incident to arrest was not permitted by the Fourth Amendment.

The *Long* warrant exception applies regardless of whether it is the arrestee or another individual whom the officer has reason to believe is dangerous. Given Officer Garcia's testimony at the suppression hearing and at trial, the Court concludes it is likely that the reviewing court will determine that the officers did not have a reasonable basis to believe that the non-handcuffed individuals, including Defendant, were dangerous or that they may obtain a weapon from the vehicle.

Accordingly, the Court finds that Defendant's non-delay appeal raises a substantial question of law that is likely to result in suppression of the firearm—the primary evidence supporting his felon in possession of a firearm conviction.

2. *Flee or Safety Concerns*

Nonetheless, the Court denies Defendant's release motion because, although Defendant is not likely to flee, the Court cannot find by clear and convincing evidence that Defendant does not pose a danger to the community's safety.

At the time of sentencing, the then twenty-two-year-old Defendant was a Criminal History Category VI, which included convictions for first-degree reckless

burning, obstruction of a law enforcement officer, residential burglary, second-degree possession of stolen property, and forgery. Defendant failed to complete high school; however, he obtained his general education development certificate while incarcerated at the Walla Walla State Penitentiary. Defendant, a daily-heroin user and gang associate, had only been employed for two (2) months while living in a half-way house at the age of seventeen (17). Because of his background, Defendant was detained pretrial[2] (Ct. Rec. 9) and the Judgment recommended that Defendant participate in the 500-hour residential drug treatment program and obtain vocational training while serving his sentence.

Defendant has served approximately thirty-three (33) months of his seventy (70) month sentence; Defendant's projected release date is December 19, 2011—approximately thirty-one (31) more months. Defendant, however, has neither completed the drug treatment program nor received occupational training, although he has been employed as an orderly. (Ct. Rec. 134-2.) Yet, during this time, Defendant amassed a disciplinary record, which includes assaulting a staff member, stabbing an inmate, and possessing contraband. (Ct. Rec. 132-2 exs. 1-5.) As a result of his disciplinary record, Defendant will be transferred to a Special Management Unit where he will be in "lock down." (Ct. Rec. 132-2.)

Given Defendant's troubling criminal and social history both before and during imprisonment, the Court cannot find by clear and convincing evidence that Defendant does not pose a danger to the community's safety if released subject to § 3142(b) or (c) conditions.

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[2] The Court notes that Defendant consented to detention.

C. Conclusion

For the reasons given above, **IT IS HEREBY ORDERED**: Defendant's Motion for Release Pending Appeal **(Ct. Rec. 116)** is **DENIED**.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and provide copies to counsel, the U.S. Probation Office, and the U.S. Marshal's Office.

DATED this 12th day of May 2009.

/s/ EDWARD F. SHEA
EDWARD F. SHEA
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-30098
UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RICARDO GONZALEZ, DEFENDANT-APPELLANT

[Filed: Mar. 16, 2010]

ORDER

Before: BETTY FLETCHER, RICHARD A. PAEZ, and N. RANDY SMITH, Circuit Judges.

Concurrence by Judge B. FLETCHER; Dissent by Judge BEA

The panel has voted to deny the Petition for Rehearing. Judges Paez and N.R. Smith have voted to deny the Petition for Rehearing En Banc, and Judge B. Fletcher has so recommended.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to hear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. *See* Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

B. FLETCHER, PAEZ, and N.R. SMITH, Circuit Judges, concurring in the denial of rehearing en banc:

Judge Bea's dissent presents a distorted view of what this case is all about. It requires a response that can be part of the public record. Otherwise our panel's reasoned response to the en banc call would remain hidden from public view.

At the time of our original disposition, the Supreme Court had not decided *Arizona v. Gant*, 129 S. Ct. 1710 (2009). Our circuit interpreted *New York v. Belton*, 453 U.S. 454 (1981), to allow law enforcement to search the passenger compartment of a vehicle so long as the search was "roughly contemporaneous with the arrest" of the vehicle's occupant. *United States v. Weaver*, 433 F.3d 1104, 1106 (9th Cir. 2006) (citation and quotation marks omitted). Accordingly, our panel in its original disposition concluded that the search of Defendant Gonzalez's vehicle did not violate the Fourth Amendment.

While Gonzalez's petition for certiorari was pending, the Supreme Court decided *Gant*, holding that a number of state and federal courts, including ours, had improperly interpreted *Belton*. Far from announcing a new rule and overruling *Belton*, the Court explained that our precedent had misinterpreted *Belton* by ignoring that *Belton* is the progeny of *Chimel v. California*, 395 U.S. 752 (1969). We had "untether[ed]" *Belton* "from the justifications underlying the *Chimel* exception," which allows searches incident to lawful arrests, but limits those searches solely to "the arrestee's person and the area . . . within which he might gain possession of a weapon or destructible evidence" at the time of the search. *Gant*, 129 S. Ct. at 1716, 1719 (citation and quotation marks omitted).

The Supreme Court granted Gonzalez's certiorari petition, vacated our panel's decision, and remanded to us "for further consideration in light of *Arizona v. Gant*." *Quintana v. United States*, 129 S. Ct. 2156 (2009) (citation omitted). In our decision on remand, we faithfully followed its instructions. We applied *Gant* consistent with the Supreme Court's precedents on the application of the exclusionary rule and on retroactivity. *See United States v. Gonzalez*, 578 F.3d 1130 (9th Cir. 2009).

Judge Bea's bold pronouncement that we disregarded *Herring v. United States*, 129 S. Ct. 695 (2009), and *Illinois v. Krull*, 480 U.S. 340 (1987), is wrong.

Indeed, we followed the teaching of the *Herring* Court that "the benefits of deterrence must outweigh the costs." 129 S. Ct. at 700. In *Gant*, the Court decided that in cases such as *Gonzalez*, the benefits of deterrence do outweigh the costs. It held that where, as in *Gant*, "it is clear that a [law enforcement] practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement 'entitlement' to its persistence." *Gant*, 129 S. Ct. at 1723. Because the unconstitutionality of the searches in *Gant* and this case was "clear," the searches never should have occurred. They were unlawful *ab initio*. As a consequence, *Gant* held that deterrence of such searches trumps the costs of exclusion. Judge Bea's argument in support of the dissenters in *Gant* is to no avail. Let him disagree with the Supreme Court, if he must, but not with our adherence to the Court's dictates.

Krull, for its part, is inapposite. It concerns law enforcement's reliance on a statute and not the interpretation of case law. The controlling authority for this case

was *United States v. Johnson*, 457 U.S. 537 (1982), not *Krull* as advocated by Judge Bea. The panel correctly followed *Johnson*.

Finally, the reader should bear in mind that this case deals with a defendant's right to suppress evidence obtained by an unconstitutional search. It does not involve whether the officers who conducted the search are entitled to qualified immunity. The rights of the defendant, not those of the police, are at issue. The dissent persists in its view that discipline of police is at issue rather than individual rights. *See* Dissent at 4347-48 ("Here, the panel confuses the retroactive application of a Supreme Court decision in the area of individual rights (a jury picked without racial motivation) with what is an area of societal rights (suppression of evidence to discipline police).").

I

The precedents that controlled our decision in *Gonzalez* were those dealing with retroactivity. All agree that when *Gant* was decided, defendant Gonzalez's conviction had not yet become final. All agree that under *Gant*, the search in our case was unconstitutional. Looking to the Supreme Court's precedents on retroactivity, we applied *Gant*, holding that the search was unconstitutional and that the evidence seized should be suppressed.

When the Supreme Court clarifies the boundaries of a constitutional search in one case, in fairness, that clarification must be consistently applied to all cases that are not yet final. That policy was applied in *Johnson*, 457 U.S. 537, and *Griffith v. Kentucky*, 479 U.S. 314 (1987).

The question in *Johnson* was whether *Payton v. New York*, 445 U.S. 573 (1980), should be applied retroactively to exclude evidence in cases pending on direct appeal. The government argued that the exclusionary rule should not apply to evidence seized in good-faith reliance on pre-*Payton* law. We quote the Court's rejection of that argument:

> The Government [relies] on [*United States v.*] *Peltier*'s broad language: "If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had *knowledge, or may properly be charged with knowledge*, that the search was unconstitutional under the Fourth Amendment" (emphasis added). The Government reads this language to require that new Fourth Amendment rules must be denied retroactive effect in all cases except those in which law enforcement officers failed to act in good-faith compliance with then-prevailing constitutional norms.
>
> . . . Under the Government's theory, because the state of Fourth Amendment law regarding warrantless home arrests was "unsettled" before *Payton*, that ruling should not apply retroactively even to cases pending on direct appeal when *Payton* was decided.
>
> Yet the Government's reading of *Peltier* would reduce its own "retroactivity test" to an absurdity. Under this view, the only Fourth Amendment rulings worthy of retroactive application are those in which the arresting officers violated pre-existing guidelines

> clearly established by prior cases. But as we have seen above, cases involving simple application of clear, pre-existing Fourth Amendment guidelines raise no real questions of retroactivity at all. Literally read, the Government's theory would automatically eliminate *all* Fourth Amendment rulings from consideration for retroactive application.
>
> The Government's [next] claim is that *Peltier*'s logic suggests that retroactive application of Fourth Amendment decisions like *Payton* even to cases pending on direct review—would not serve the policies underlying the exclusionary rule. . . .
>
> . . . .
>
> If, as the Government argues, all rulings resolving unsettled Fourth Amendment questions should be nonretroactive, then, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior. Official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be excluded only in the one case definitively resolving the unsettled question. Failure to accord *any* retroactive effect to Fourth Amendment rulings would "encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach."

457 U.S. at 559-61 (citations omitted). Like *Payton*, *Gant* clarified a point of law that the Court had not yet explicitly addressed: the scope of the Court's holding in *Belton*. *Compare State v. Gant*, 162 P.3d 640, 645 (Ariz.

2007) (majority opinion) ("We do not . . . read *Belton* or *Thornton* as abandoning the *Chimel* justifications for the search incident to arrest exception."), *with id.* at 647 (Bales, J., dissenting) ("The validity of a *Belton* search . . . clearly does not depend on the presence of the *Chimel* rationales in a particular case."). As does Judge Bea, the United States in *Johnson* argued that excluding evidence seized in violation of *Payton* would not appreciably deter police misconduct. That argument was made, and the *Johnson* Court firmly rejected it; our panel was compelled to do so also.

Griffith—which was decided *after* the Supreme Court recognized the good-faith exception in *United States v. Leon*, 468 U.S. 897 (1984)—reaffirmed *Johnson*'s "holding that 'subject to [certain exceptions], a decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered.'" 479 U.S. at 324 (quoting *Johnson*, 457 U.S. at 562). Like *Johnson*, it explicitly considered and rejected "'reliance by law enforcement authorities on the old standards'" as a reason not to apply a Fourth Amendment decision retroactively. *Id.* at 324-25 (quoting *Johnson*, 457 U.S. at 549). *Johnson* and *Griffith* compel the result the panel reached.

Judge Bea relies on *United States v. Peltier*, 422 U.S. 531 (1975), which declined to apply *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), retrospectively. In light of *Johnson*, we think his reliance misplaced. The *Johnson* Court made clear that *Peltier*'s holding applied only to cases that "work[ed] a sharp break in the web of the law." 457 U.S. at 551 (citation and quotation marks omitted). The *Gant* majority stated that its holding

worked no such break. *See Gant*, 129 S. Ct. at 1719, 1722 & n.9 (reasoning that holding followed straightforwardly from *Chimel* and that the facts of *Belton* and *Thornton v. United States*, 541 U.S. 615 (2004), were "easily distinguished"). In arguing otherwise, Judge Bea sides with the *Gant* dissenters. *See id.* at 1726 (Alito, J., dissenting) (contending that majority's holding created a "new rule").

Judge Bea also relies on *Krull* to argue against the exclusion of evidence in this case. *Krull* dealt with law enforcement reliance on a statute, which like most statutes, carries the presumption of constitutionality. 480 U.S. at 342. Here, by contrast, law enforcement relied on a misapplication of *Belton* that *Gant* deemed "clear[ly]" unconstitutional; *Belton*, when properly interpreted, would counsel all along that the searches in *Gant* and *Gonzalez* were unconstitutional. *Gant*, 129 S. Ct. at 1723.

More fundamentally, the fact remains that when the Supreme Court in *Johnson* was faced with precisely the question that confronted our panel, it held that the exclusionary rule applied to cases pending on direct appeal. *Johnson* directly controls. Until such time as the Court were to overrule *Johnson*, it is *Johnson* and not *Krull* that we must follow.

II

The panel's decision is directly supported by *Gant* itself. In *Gant*, the Supreme Court interpreted *Belton*, 453 U.S. 454, to allow a vehicle search incident to an arrest of the vehicle's occupant only where the "arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to be-

lieve the vehicle contains evidence of the offense of arrest." *Gant*, 129 S. Ct. at 1723. This holding prompted a vigorous dissent:

> The *Belton* rule has been taught to police officers for more than a quarter century. Many searches—almost certainly including more than a few that figure in cases now on appeal—were conducted in scrupulous reliance on that precedent. It is likely that, on the very day when this opinion is announced, numerous vehicle searches will be conducted in good faith by police officers who were taught the *Belton* rule.

Id. at 1728 (Alito, J., dissenting).

The majority, however, did

> not agree with the contention in Justice Alito's dissent . . . that consideration of police reliance interests requires a different result. Although it appears that the State's reading of *Belton* has been widely taught in police academies and that law enforcement officers have relied on the rule in conducting vehicle searches during the past 28 years, many of these searches were not justified by the reasons underlying the [search-incident-to-arrest] exception . . . . The fact that the law enforcement community may view the State's version of the *Belton* rule as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights protected. If it is clear that a practice is unlawful, individuals' interest in its discontinuance

> clearly outweighs any law enforcement "entitlement" to its persistence.

Id. at 1722-23 (footnote omitted). The *Gant* majority ruled as it did precisely because the "interest that all individuals share in having their constitutional rights protected" outweighs good-faith "police reliance interests." In short, the Supreme Court has already decided that in a case such as ours, "the benefits" of the exclusionary rule "outweigh the costs." *Herring*, 129 S. Ct. at 700.

It is no answer to say, as does Judge Bea, that the majority and the dissent were arguing about *stare decisis* and not deterrence of "clear[ly] . . . unlawful" searches. *Gant*, 129 S. Ct. at 1723. The majority expressly stated that it was not overruling *Belton*, *see id.* at 1722 n.9, and thus it also implicitly recognized that the doctrine of *stare decisis* had little, if any, force in *Gant*. *See id.* at 1722 ("[W]e would be particularly loath to uphold an unconstitutional result in a case that is so easily distinguished from the decisions that arguably compel it. . . . It is thus unsurprising that Members of this Court who concurred in the judgments in *Belton* and *Thornton* also concur in the decision in this case."). The flash point of disagreement between the majority and dissent in *Gant* was not so much *stare decisis* as "police reliance interests." *See id.* at 1722-23. Justice Alito's concern about "the suppression of evidence gathered in many searches carried out *in good-faith reliance* on well-settled case law," *id.* at 1726 (Alito, J., dissenting) (emphasis added), demonstrates that *Gant* was about suppression of evidence and not just the constitutionality of the search.

That the majority and dissenting opinions should have clashed over the exclusionary rule is not surprising, for in *Gant*, the Arizona Supreme Court had not simply declared the search unconstitutional, but had also ordered the exclusion of the evidence. *State v. Gant*, 162 P.3d at 646. By affirming the Arizona Supreme Court, the Court necessarily affirmed the exclusion of the evidence.

III

The panel's decision is compelled by the Supreme Court's retroactivity precedents and dictated by *Gant*. The court was right to deny en banc rehearing.

Judge BEA, with whom O'SCANNLAIN, KLEINFELD, GOULD, TALLMAN, BYBEE, and CALLAHAN, Circuit Judges, join, dissenting from denial of rehearing en banc:

I dissent from our denial of the petition for rehearing en banc, first, because the panel's decision disregards the Supreme Court's decisions in *Herring v. United States*, ___ U.S. ___, 129 S. Ct. 695, 700 (2009), and *Illinois v. Krull*, 480 U.S. 340 (1987), regarding when police misconduct justifies suppression of relevant evidence in a criminal trial, and second, because the panel's decision creates a split among the circuits. *See United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009), *cert. denied*, 78 U.S.L.W. 3221 (U.S. Mar. 1, 2010) (No. 09-402); *United States v. Jackson*, 825 F.2d 853 (5th Cir. 1987) (en banc).

I. Introduction

The panel has decided that evidence seized by a police officer acting in good faith reliance on the predominant interpretation of Supreme Court precedent should be suppressed, despite the fact that suppression in this case cannot conceivably result in appreciable deterrence of future police misconduct. How does it deter police *misconduct* in the future to tell the police: "the evidence you seized legally, under the law, cannot be used because the law has changed, and now, what wasn't misconduct at the time you acted has become misconduct"? The attentive policeman hearing this might well look blankly and ask: "Who knew? Am I supposed to guess? What am I supposed to do next time? *Not* follow the law as written by the Ninth Circuit, but hold back a little? How much?"

The panel's decision is in direct conflict with the Supreme Court's recent holding in *Herring v. United States*: "[T]he exclusionary rule is not an individual right and applies only where it results in appreciable deterrence [of police misconduct]." 129 S. Ct. at 700 (quotation marks and alterations omitted). Because the sole justification—up until now—for exclusion of relevant evidence improperly seized has been to deter future police misconduct,[1] the Supreme Court has held suppression is not an available remedy when police officers conducted a search in good faith reliance on some higher authority, such as a warrant or a statute, even if the

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[1] Justice Ginsburg, in her dissent in *Herring*, offered alternative justifications for applying the exclusionary rule, but those justifications have not been adopted by the Supreme Court. *See* 129 S. Ct. at 707-08 (Ginsburg, J., dissenting). Since the panel did not rest its decision on any of Justice Ginsburg's thoughts, they need not here be discussed.

warrant or statute were later held invalid or unconstitutional (the "good faith exception"). *See Krull*, 480 U.S. 340 (statutes), *United States v. Leon*, 468 U.S. 897 (1984) (warrants). Here, the police officer relied on a different kind of authority, namely the settled case law under *New York v. Belton*, 453 U.S. 454, 460 (1981); *see also United States v. Weaver*, 433 F.3d 1104, 1106 (9th Cir. 2006) (our circuit's adoption of *Belton*).

Officer Garcia lawfully stopped a vehicle with four occupants. Defendant Gonzalez was riding as a passenger in the vehicle. After the vehicle was apparently secure against any risk to the officer, and the vehicle's occupants had moved away from the vehicle, Officer Garcia searched the vehicle and discovered Gonzalez's 9mm pistol in the glove compartment. It is undisputed that, at the time of the search, Officer Garcia was acting in the good faith belief that the law—the predominant interpretation of *Belton*—allowed him to make that search.

Defendant Gonzalez moved at trial to suppress evidence of the 9mm pistol that Officer Garcia seized during his search of the vehicle. The district court denied the motion to suppress; we affirmed.

The Supreme Court then announced its decision in *Arizona v. Gant*, 129 S. Ct. 1710 (2009), which held such searches unconstitutional. The Court vacated our opinion in the instant case and remanded it back to us with the instruction to consider the case in light of its ruling in *Gant*. Note that the Court did not reach the same result in this case as it had in *Gant*, where it upheld suppression of the evidence. It vacated and remanded; it did not order the lower courts to suppress the evidence of Gonzalez's possession of the 9mm pistol.

On remand following the Supreme Court's decision in *Gant*, the panel correctly held that the search was unconstitutional but, I believe, incorrectly held that the good faith exception did not apply, and therefore ordered the evidence suppressed.

To reach its result in favor of suppression, the panel holds that a police officer's reliance on settled case law is somehow different from a police officer's reliance on a reasonable warrant (*Leon*) or statute (*Krull*). But, the panel does not explain either in its opinion or its concurrence from the order denying rehearing en banc, and I can fathom no possible reason, why it found a difference between a rule applicable to a magistrate's warrant, later found inadequate (*Leon*), or a statute later found to be unconstitutional (*Krull*), and circuit court case law, later found to no longer allow the search in question (*Gant*). It is not misconduct for the police to rely on a reasonable warrant even if the warrant was later held invalid. *Leon*, 468 U.S. at 922. Nor was it misconduct for the police to rely on a reasonable statute, even if the statute is later held unconstitutional. *Krull*, 480 U.S. at 361. We should encourage our officers to act within the bounds of the law as defined by magistrates and legislatures. *United States v. Peltier*, 422 U.S. 531, 542 (1975). Why then should we make police actions futile when those actions are fully in accord with the settled decisions of our courts when the actions are taken? I submit we should not.

The Supreme Court, moreover, has already said so: "[U]nless we are to hold that parties may not reasonably rely upon any legal pronouncement emanating from sources other than this Court, we cannot regard as blameworthy those parties who conform their conduct to

the prevailing statutory or constitutional norm." *Peltier*, 422 U.S. at 542. There is no dispute that, before the Supreme Court decided *Gant*, the prevailing—even predominant—constitutional norm under *Belton*—as applied in this Circuit by *Weaver*—was to permit searches of vehicles, including glove compartments, even if the defendant or suspect was not within arm's reach of the vehicle and the contents of the vehicle could not reasonably present a risk to the arresting officer. There was nothing blameworthy, and certainly nothing flagrant, about what Officer Garcia did. *See Herring*, 129 S. Ct. at 702 (holding that the exclusionary rule arose from "flagrant and deliberate" violations of rights). I am at a loss to grasp how suppression of the evidence Officer Garcia discovered while properly doing his job, within the boundaries set by the law as it then existed, will deter other police officers from violating other individuals' Fourth Amendment rights.

Suppose that at the next opportunity to consider the matter, the Court were to determine that automobile stops on objectively reasonable bases—e.g., expired license plate registration tags, burnt out rear lights, etc.—but *actually* motivated by police officers' desire to investigate the cars' occupants and interiors, were no longer constitutionally valid, thereby overruling *Whren v. United States*, 517 U.S. 806 (1996). Routine traffic stops and other searches permitted under *Whren* have become a staple in law enforcement's arsenal of crime-fighting tools. Would all the many pending cases founded on evidence retrieved in such searches be subject to reversal? That is precisely the principle which is being adopted by the panel's decision.

The predictable effect of the panel's decision will be to undermine police officers' ability to catch and prosecute criminals. First, the panel's decision will deprive prosecutors of inculpatory evidence supporting numerous prosecutions and convictions of criminals whose cases were pending at the time *Gant* was decided. As the Government contended in its petition for rehearing en banc: "[I]t is important to recognize that *Belton* searches were a fixture in law enforcement prior to *Gant*. The panel's decision thus has the potential to disrupt numerous convictions and ongoing prosecutions that rely on evidence obtained in *Belton* searches conducted consistent with the decisions of this Court." Second, the panel's opinion will generate ongoing uncertainty among police officers about their ability to follow the decisions of this court, or even the Supreme Court, without finding that their work has been for nought. This uncertainty will most likely cause police officers to act overly cautious in pursuing criminals, thus endangering public safety. But it may also have the perverse effect of so frustrating police officers that they may simply ignore our case law, in the hope it may have changed by time of trial and appeal. This result would not only endanger public safety by increasing the amount of evidence the courts will suppress, but would also endanger the public's Fourth Amendment rights.

If there is a silver lining to the panel's decision to flout Supreme Court case law in *Herring* and *Krull*, it is that the panel has set the stage for the Supreme Court to review the scope of the exclusionary rule in light of the circuit split we have now created. The panel's opinion reaches a conclusion directly contrary to that of *McCane*, 573 F.3d 1037, which held the good faith exception applies to searches held unconstitutional in *Gant*.

The opinion is also in direct conflict with *Jackson*, 825 F.2d 853, which held the good faith exception applied to warrantless searches conducted near the border when, at the time the searches took place, they were valid under Fifth Circuit cases that were later overruled by that Circuit.

For these reasons, I respectfully dissent from the denial of rehearing en banc.

II. Factual and Procedural Background

Officer Garcia lawfully stopped a vehicle with four occupants. One of the passengers, Silviano Rivera, had several outstanding warrants for his arrest. Garcia placed Rivera in custody and the other passengers exited the vehicle. Officer Garcia searched the vehicle and discovered a loaded 9mm pistol in the unlocked glove compartment. The two female occupants of the vehicle told Garcia the firearm belonged to the fourth occupant, defendant Ricardo Gonzalez. Gonzalez was arrested and charged with being a felon in possession of a firearm. At trial, Gonzalez moved to suppress the evidence discovered during the officer's search. The district court denied the motion. A jury found Gonzalez guilty of the firearm possession charge, and he was sentenced to 70 months' imprisonment.

Gonzalez appealed his conviction and sentence, contending in part that the district court erred in denying his motion to suppress. The panel affirmed, holding the search was lawful under *Belton*, 453 U.S. at 460, and *Weaver*, 433 F.3d at 1106.

The Supreme Court then decided *Arizona v. Gant*, 129 S. Ct. 1710 (2009), which expressly narrowed the predominant interpretation of *Belton* by circuit courts,

holding a search of a vehicle incident to arrest may include the passenger compartment only if the "arrestee is unsecured or within reaching distance of the passenger compartment at the time of the search," *id.* at 1719, or "when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle," *id.* at 1714. The Supreme Court vacated the panel's decision in light of *Gant*. *Quintana v. United States*, 129 S. Ct. 2156 (2009). The Court did not reverse with instructions to enter a judgment of acquittal for Gonzalez nor did it order the lower courts to effect a suppression of the evidence.

On remand, the government conceded the search was unconstitutional under *Gant*. *United States v. Gonzalez*, 578 F.3d 1130, 1132 (9th Cir. 2009). The government contended, however, that this Circuit should affirm the district court's order denying Gonzalez's motion to suppress because the officer conducting the search did so in good faith reliance on then-prevailing Supreme Court and Ninth Circuit precedent. There is no dispute that the officer was acting in good faith at the time of the search.

III. The Fourth Amendment, the Exclusionary Rule, and the Good Faith Exception.

Although it is undisputed here that the search turned out to be unconstitutional under *Gant*, finding the search unconstitutional does not automatically invoke the exclusionary rule as to the evidence unearthed by the search. As in *Herring*, the finding of unconstitutionality is only the first step in a two step analysis.

The second step is to decide whether such evidence *should* be suppressed. *Leon*, 468 U.S. at 906 ("Whether

the exclusionary sanction is appropriately imposed in a particular case, our decisions make clear, is an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." (quotation marks omitted)); *see also Herring*, 129 S. Ct. at 700 ("We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation.").

"When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure." *Krull*, 480 U.S. at 347. But, the remedy of exclusion "has been restricted to those situations in which its remedial purpose is effectively advanced." *Id.* In *Herring*, the Supreme Court made clear that for courts to suppress evidence "the benefits of deterrence must outweigh the costs." 129 S. Ct. at 700.

Suppressing evidence of Gonzalez's firearm here would not result in any appreciable deterrence of police misconduct. As the Supreme Court explained in *Peltier*, there is nothing wrong with police officers acting under the authority of settled case law, including case law from courts other than the Supreme Court. 422 U.S. at 542. If that law turns out to be wrong, then it was the court that was at fault, not the police officers. *See id.* Therefore, there is no benefit to suppressing the evidence in this case. The cost of suppression, moreover, is obvious; Gonzalez—a criminal convicted of being a felon in possession of a firearm—goes free. On balance, there is zero benefit and an obvious cost to suppressing the evidence. The evidence should not be suppressed.

Although this cost-benefit calculation is an inherent component of the exclusionary rule, the Supreme Court has explained that when police officers act in good faith when conducting a search, their objectively reasonable belief is sufficient to show the balance tilts away from suppression. *See Herring*, 129 S. Ct. at 701 ("We (perhaps confusingly) called this objectively reasonable reliance 'good faith.'"). Cases articulating this "good faith exception" fall into two categories. The first category includes cases where there was some error in the issuance of a warrant used to execute the search. *See Herring*, 129 S. Ct. at 695 (holding that evidence should not be suppressed where a county warrant clerk mistakenly told officers there was an outstanding warrant on file for defendant, but later discovered her error: the warrant had been recalled before its use by the officers); *Arizona v. Evans*, 514 U.S. 1, 15 (1995) (holding that evidence should not be suppressed where officers relied on a computer database which showed the defendant had an outstanding arrest warrant, but later learned a court clerk failed to update the database to show the defendant's warrant had been quashed); *United States v. Leon*, 468 U.S. 897, 919-20 (1984) (holding that evidence should not be suppressed where officers arrested and searched defendant pursuant to a facially lawful warrant, but a district judge later held the warrant lacked probable cause). These cases are instructive because the Supreme Court has repeatedly emphasized that the sole purpose of the exclusionary rule is to deter future unlawful police searches.

It is, however, the second category of cases that is more relevant here; this category includes cases where law enforcement officers conduct a search under a statute that was later determined unconstitutional. *See*

Krull, 480 U.S. 340; *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979).

In *Krull*, the State of Illinois appealed the trial court's order suppressing evidence discovered during an administrative (i.e., warrantless) search pursuant to Illinois's statutory regime which regulated the sale of automobiles and automobile parts. A police officer conducted an administrative search of the records of an automobile wrecking yard and discovered three stolen vehicles on the property. The following day, a federal district court held the Illinois statute authorizing such administrative searches was unconstitutional. The state trial court agreed and ordered the evidence suppressed. The Illinois Supreme Court affirmed, and the State appealed to the U.S. Supreme Court.

The Supreme Court reversed, holding the good faith exception applied to searches conducted pursuant to a statute that was not "obvious[ly]" unconstitutional. 480 U.S. at 359. The Court held: "evidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Id.* at 359-60 (quotations omitted). "The application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect on the officer's actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant." *Id.* at 349.

As the Court could discern no deterrent effect that suppression would have on officers, it turned to the question whether suppression would deter legislators from enacting statutes that ignored or subverted the

Fourth Amendment. *See id.* at 351. The Court held there was no evidence that suppression would "act as a significant, additional deterrent." *Id.* at 352. Hence, the "substantial social cost" of excluding inculpatory evidence against defendants—letting the guilty go free—outweighed any incremental deterrent effect, which convinced the Court that applying the exclusionary rule was unjustified. *Id.* at 35253; *see also DeFillippo*, 443 U.S. at 38 ("Police are charged to enforce laws until and unless they are declared unconstitutional. . . . Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement.").[2]

In *McCane*, 573 F.3d 1037 (10th Cir. 2009), the Tenth Circuit addressed the precise situation presented in *Gonzalez*; and it held the good faith exception did apply. 573 F.3d at 1045. A police officer stopped McCane on suspicion of driving on a suspended license. The officer arrested McCane, handcuffed him, and placed him in the back of the patrol car. The officer then searched McCane's vehicle and discovered a firearm in the pocket of the driver's side door. McCane moved to suppress the evidence of the firearm. The district court held the search was valid. While McCane's appeal was pending, the Supreme Court decided *Gant*. The Tenth Circuit held the search was unconstitutional, but affirmed based on the good faith exception to the exclusionary rule.

First, the Tenth Circuit held that its precedent was well-settled that vehicle searches incident to arrest were

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[2] Although decided before *Leon* and not using the good faith exception language, *DeFillippo* denied suppression of evidence where the search was executed under a local ordinance that was later found to be unconstitutional. 443 U.S. at 40.

lawful under *Belton*, even if the arrestee was secured and offered no danger to the arresting officer at the time of the search. The court then held the good faith exception applied because suppressing evidence discovered during a search that was *constitutional* under settled law, as it existed at the time of the search, would not deter law enforcement officers from conducting *unconstitutional* searches. The exclusionary rule is meant to "deter objectively unreasonable police conduct" and "to deter misconduct by law enforcement officers, not other entities." *McCane*, 573 F.3d at 1044. Because "no deterrent effect would result from suppressing the evidence seized from McCane's vehicle, the Tenth Circuit declined "to apply the exclusionary rule when law enforcement officers act in objectively reasonable reliance upon the settled case law of a United States Court of Appeals." *Id.* at 1045.

In *Jackson*, the defendants were all searched at a highway checkpoint that prior Fifth Circuit cases had deemed a functional equivalent of the border, thus excepting police searches from the warrant requirement. *Id.* at 854-55. In an en banc decision, the Fifth Circuit disapproved its earlier cases and held the checkpoint was, indeed, not a border equivalent. Warrantless and no-probable-cause searches could not there be performed. *Id.* at 854. Nevertheless, the court affirmed the defendants' convictions, based on the evidence seized during warrantless searches, because the "searches were conducted in good faith reliance upon [the Fifth Circuit's] earlier decisions." *Id.* The court held "[t]he reasoning of *Leon* fully applies to the case at hand." *Id.* at 866. The court noted that it had upheld searches at the checkpoint numerous times—i.e., the law was well-settled—and that there was no suggestion the

Fifth Circuit was "inclined to ignore or subvert the Fourth Amendment." *Id.* (quoting *Leon*, 468 U.S. at 916).[3]

Despite these cases, the panel held the good faith exception did not apply because *Krull* was limited to searches conducted under statutory authority and did not extend to searches conducted under well-settled case law precedent. Of course, *Krull* dealt only with a statute-based search. The Court said nothing about a search based on settled case law, nor that its holding could not be extended to the latter. The panel provides a curious reason for its disregard of *Krull*; it chooses to follow a pre-*Leon* case before the "good faith exception" was developed, *Johnson*, rather than a post-*Leon* "good faith exception" case. But the panel gives no reason why we should treat our decisions as lesser law under the good faith exception than statutes or administrative regulations.

To clear away any confusion, the existence of a relevant court case supporting an officer's search does not automatically prove he was acting in good faith where that case is later overruled. A police officer must still prove that his reliance was objectively reasonable. That problem, however, is no different from the problem law enforcement officers face when deciding if a statute is obviously unconstitutional. *See Krull*, 480 U.S. at 355 ("Nor can a law enforcement officer be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional."). And the same problem recurs when law enforcement officers

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[3] I do not think this circuit is any more inclined to subvert the Fourth Amendment than is the Fifth Circuit.

decide whether a "warrant was so facially deficient that the executing officers cannot reasonably presume it to be valid." *Id.* (quotation marks omitted). In this case, an objectively reasonable officer would have no basis for suspecting the Ninth Circuit's well-settled interpretation of *Belton* was obviously unconstitutional. *See Weaver*, 433 F.3d at 1106.

IV. Retroactivity Cases Do Not Apply Because Here the Rule to Be Applied Retroactively (*Gant*) Does Not Eliminate the Good Faith Exception (*Leon*, *Krull*)

Because the panel held that *Krull*, and the other cases applying the good faith exception, did not control, the panel instead relied on *United States v. Johnson*, 457 U.S. 537, 562 (1982), which held that "a decision of the Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered." *See also Griffith v. Kentucky*, 479 U.S. 314 (1987).[4] To do otherwise would "violate the principle of treating similarly situated defendants the same." *Gonzalez*, 578 F.3d at 1132 (quoting *Johnson*, 457 U.S. at 555). Guided by that principle, the panel held the firearm must be suppressed in *Gonzalez* because the cocaine was suppressed in *Gant*. In reaching this conclusion, however, the panel ignores that Gant and Gonzalez were *not* similarly situ-

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[4] In *Griffith*, the Court held that *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding a criminal defendant could establish a prima facie case of racial discrimination based on the prosecution's use of peremptory challenges to strike members of the defendant's race), applied retroactively to cases pending when *Batson* was decided. The Court reemphasized that "selective application of new rules violates the principle of treating similarly situated defendants the same." *Id.* at 323. *Griffith* held that even cases that were a "clear break" from prior law were retroactive to pending cases. *Id.* at 326-27.

ated in a crucial determinant: The government did not raise the good faith exception in Gant's case, but it did in this case.

Therefore, it is simple to reconcile *Johnson* with *Krull*. *Johnson* holds that defendants, whose cases are pending at the time of a law-changing decision, should be entitled to invoke the new rule. *Id.* at 545. Gonzalez *has* invoked the new rule announced in *Gant* and that rule *does* apply to his case; the search of Gonzalez's car, like the search of Gant's car, was unconstitutional. But, once Gonzalez has invoked the rule in *Gant*, the Government is still entitled to invoke the good faith exception, and it has done so here. Nothing in *Gant* eliminates or narrows the good faith exception to the exclusionary rule for the simple reason that the issue whether the good faith exception applied was not raised nor reached in *Gant*.

Nothing in *Gant* suggests suppression is the necessary result of invoking the new rule. There is no suggestion the Arizona state prosecutors ever raised the good faith exception before the U.S. or the Arizona Supreme Court. *See Gant*, 129 S. Ct. at 1723-24. The Arizona Supreme Court held: "The State has advanced no alternative theories justifying the warrantless search of Gant's car, and we note that no other exception to the warrant requirement appears to apply." *State v. Gant*, 162 P.3d 640, 646 (Ariz. 2007). The Arizona Supreme Court then discussed the automobile exception, the plain view exception, and the inventory search exception. *Id.* There is no mention of the good faith exception in the Arizona Supreme Court opinion. Nor is there any men-

tion of the good faith exception in the majority opinion in *Gant*.[5]

Unfortunately, the panel's concurrence to the order denying rehearing en banc takes the Supreme Court's analysis of "police reliance interests" in *Gant* completely out of context. First, reading *Gant*, it is not obvious that "police reliance interests" have anything to do with police officers' good faith reliance on settled law. The Supreme Court did not define "police reliance interests," but, in context, those interests appear to have more to do with the cost of retraining officers than anything related to the good faith exception. *See Gant*, 129 S. Ct. at 1722-23. Second, *Gant* decided only that such interests were insufficient to justify perpetuating the rule that permitted unconstitutional searches in the future. *Gant* did not balance the deterrent effect against the potential for overturned criminal convictions if evidence from *prior* searches is suppressed. *Id.*

Moreover, *Johnson* is consistent with applying the good faith exception in this case. The Court in *Johnson* argued that suppressing evidence seized in a search conducted under "unsettled" law might have a deterrent effect on police, even though suppressing evidence seized in a search conducted under "settled" law would not. 457 U.S. at 560-61. *Johnson*, far from supporting the panel's opinion, actually provides an example where the Supreme Court held that the police officer's reliance on case law was not objectively reasonable. *Johnson* is

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[5] Justice Alito, in his dissent, makes a passing reference to evidence seized in good faith reliance on well-settled case law; he cautions *Gant* will result in the suppression of such evidence, 129 S. Ct. at 1726, but he does not explain why. Nor did the majority in *Gant* acknowledge that argument.

consistent with the application of the good faith exception announced two years later in *Leon*. In *Johnson*, the issue was searches incident to warrantless home arrests. The Court held that area of law was "unsettled" and that "[l]ong before *Payton* [*v. New York*, 445 U.S. 573 (1980)], for example, this Court had questioned the constitutionality of warrantless home arrests. Furthermore, the Court's opinions consistently had emphasized that, in light of the constitutional protection traditionally accorded to the privacy of the home, police officers should resolve any doubts regarding the validity of a home arrest in favor of obtaining a warrant." *Id.* at 560-61.

Therefore, the panel's concurrence to the order denying rehearing en banc errs in likening *Gant* to *Payton*; the panel's concurrence overlooks that law may be *settled* by courts other than the Supreme Court. *Peltier*, 422 U.S. at 542. Here, there is no question that the law governing the constitutionality of *Belton* searches was settled, at the very least within our circuit. *See Weaver*, 433 F.3d at 1106. As the panel's own opinion states, the scenario in this case is "a search conducted under a *then-prevailing* interpretation of a Supreme Court ruling." *Gonzalez*, 578 F.3d at 1132 (emphasis added); *see also Gant*, 129 S. Ct. at 1718 (finding the broad interpretation of *Belton* "has predominated").

It is clear the *Johnson* Court adopted the reasoning of *Peltier*, approving of the underlying rationale behind the good faith exception, when it held: "*Peltier* suggested only that retroactive application of a Fourth Amendment ruling that worked a 'sharp break' in the law, like *Almeida-Sanchez*, would have little deterrent effect, because law enforcement officers would rarely be

deterred from engaging in a practice they never expected to be invalidated." *Id.* at 560.

It is in the retroactivity context that *Griffith* has apparently confused the panel. *Griffith* held that the Supreme Court's decisions were retroactive as to pending appeals regardless whether the decision worked a "sharp break" in the law. 479 U.S. at 327. But *Griffith* was about *Batson* challenges and therefore about defendants' Fourteenth Amendment rights—a right held by the individual defendant. *Id.* at 316. A prosecutor's violation of a defendant's Fourteenth Amendment rights does not raise the issue of deterrence that is inherent to the judicially created exclusionary rule. Nor does it raise the balancing test issues central to the Court's decision in *Herring*, 129 S. Ct. at 700. A defendant has a right to a jury chosen without racial motivation regardless whether a reversal of a conviction will teach prosecutors a lesson and deter similar racially motivated conduct in the future. Here, the panel confuses the retroactive application of a Supreme Court decision in the area of individual rights (a jury picked without racial motivation) with what is an area of societal rights (suppression of evidence to discipline police). *Gant* should have been retroactively applied to Gonzalez's case. And it was. Officer Garcia's search was held unconstitutional. But the remedy of suppression of the evidence so seized is not compelled by *Gant*. That remedy is governed by *Leon*, *Krull*, and *Herring*. Those cases point firmly toward denying suppression.

If there is any support for the panel's opinion it can be found only in Justice O'Connor's dissent in *Krull*. She wrote: "I find the Court's ruling in this case at right angles, if not directly at odds, with the Court's recent

decision in *Griffith*." 480 U.S. at 368. With all respect to Justice O'Connor, her position did not carry the majority vote. Her dissent does, however, cleanly frame the issue the panel decides today: Does the good faith exception to the exclusionary rule apply despite the Supreme Court's retroactivity precedents? The majority of the Supreme Court held that it does in *Leon*, *Krull*, and *Herring*. The panel attempts to elide the issue by asserting case law and statutes are distinct, but that is not only a distinction without a difference in our system of branches of government with equal rank between the legislatures and judiciary, but is an assertion rejected in *Peltier*, a case by which we are bound. What the panel actually does is follow Justice O'Connor's dissent rather than following Supreme Court law.

V. Conclusion

Under our Fourth Amendment jurisprudence, courts keep vigil over police officers' power to search and seize. The panel treads over the line between vigilance and punishment. Not only does the panel negate the dutiful—at the time done—investigatory work of Officer Garcia and all similarly situated officers, but it hamstrings all police officers, who must now worry that every search they conduct under permissible circumstances—remember *Whren*—may later be rendered worthless by a change in the law as found by a later court, no matter how foreseeable or not. We should not put the police in the business of foreseeing how courts will change their views of the Fourth Amendment. We should expect them to follow the law, and when doing so, to be able to use the evidence so procured.